Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1996

W. H. AVITTS, ET AL.,

Petitioners,

vs.

AMOCO PRODUCTION CO., ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Fifth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

QUESTION 1

In vacating the largest 28 U.S.C. § 1407(c) award in history, did the 5th Circuit err when it

(a) held that filing a Motion to Remand is a mandatory, threshold pre-requisite before one may be entitled to a 28 U.S.C. § 1447(c) award for erroneous removal, a requirement not placed in the statute by Congress?

(b) narrowly interpreted 28 U.S.C. § 1447(c) to permit only an award of costs, fees and expenses directly incurred in challenging removal, contrary to interpretations espoused by the 2nd and the 3rd Circuits?

(c) decided the appeal based on an argument not raised in the trial court, contrary to long-settled precedent?

(d) limited 28 U.S.C. § 1447(c) awards to be against removing Defendants only, where non-removing Defendants accepted the removal and acted in concert with the removing Defendant?

(e) shifted the Congressionally-mandated focus away from the propriety of removal and onto the non-removing Plaintiffs' post-removal conduct, when considering a 28 U.S.C. § 1447(c) award?

(f) interpreted 28 U.S.C. § 1447(c) in a way contrary to the interpretations of other Circuits?

(g) *eo instante* made fact findings the trial Court never made and was never even asked to make, contrary to long-settled precedent?

QUESTIONS PRESENTED – Continued

(h) substituted its discretion for that of the trial court to hold that no 28 U.S.C. § 1447(c) award was proper?

LIST OF PARTIES

Per Sup. Ct. Rule 14.1(b) Petitioners tender the following:

PETITIONERS/PLAINTIFFS

W.H. Avitts, Laverne Lang, Edward Lubojacky, Vernon Smith, Tetsu Tindel, O.F. Westinghouse, Joseph E. Durso, Geraldine Louden, O.L. Surface, Patty Ann Walker, Steve Townsend, Melvin Carpenter, Joseph A. Durso, Margret L. Durso, Jimmy Dean Long, John W. Collins, et al.

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(Houston, Texas)

APPELLANT

Apache Corporation/M.W. Petroleum Company

LIST OF PARTIES – Continued

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REFERENCE TO THE DECISIONS BELOW

Per Sup. Ct. Rule 14.1(d), reference is made to the decisions below in this case: *Avitts et al v. Amoco et al*, 53 F.3d 690 (*Avitts I*/Appendix A), *Avitts et al v. Amoco et al*, (*Avitts II*/Appendix B), *Avitts et al v. Amoco et al*, 111 F.3d 30 (*Avitts III*/Appendix C).

GROUNDS FOR JURISDICTION

Per Sup. Ct. Rule 14.1(e), the 5th Circuit decision to be reviewed was issued on April 28, 1997. A Motion for Rehearing (coupled with a suggestion for en banc consideration) was timely filed, Rehearing being denied by Order dated June 3, 1997, the 5th Circuit not reaching Rehearing en banc. *Avitts IV* (Appendix D).

This Court has jurisdiction to review the 5th Circuit decision per 28 U.S.C. §1447(c), (d). *Miranti v. Lee*, 3 F.3d 925, 927-8 (5th Cir. 1993); *LaMotte v. Roundy's Inc.*, 27 F.3d 314, 315 (7th Cir. 1994).

THE STATUTE AT ISSUE: 28 U.S.C. §1447(c)

> "If at any time before final Judgment it appears that the District Court lacks subject matter jurisdiction, the case shall be remanded. An Order remanding the case may require payment of just costs and any actual expenses, including attorneys fees, incurred as a result of removal".

28 U.S.C. §1447(c).

STATEMENT OF THE CASE

The course of proceedings and disposition below are correctly set out in *Avitts I*, 53 F.3d 690 (*App. A*) and the trial Court's Order awarding Petitioners' §1447(c) costs, fees and expenses (*Avitts II, App. B*), both referred to in the Panel Decision at issue here. *Avitts III*, 111 F.3d 30 (*App. C*).

Petitioners (surface and royalty interest owners in an oil field) filed suit in State Court against the operators of the field, asserting that they contaminated the surface and sub-surface with saltwater, failed to plug abandoned wells to prevent seepage, and allowed oil and waste products to spill onto the surface. Amoco wrongfully Removed. *Avitts I*, 53 F.3d at 693 ("Removal jurisdiction- . . . simply did not exist"). Petitioners amended to add Apache and M.W. as Defendants. Apache and M.W. "accepted the Removal"[1] and together (with Amoco) pursued massive discovery to include "hundreds of thousands (of pages) of paper discovery" and numerous lay/expert depositions. (*Avitts II*). Respondents jointly (but unsuccessfully) sought Mandamus relief to avoid discovery just prior to the original trial date, which ultimately was continued by the trial Court due to other matters and re-set.

After "the parties announced . . . ready . . . (and) complete, exhaustive discovery", trial began and then

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[1] *Getty Oil v. INA*, 841 F.2d 1254, 1263 (5th Cir. 1988) (in a Removed case, a newly-added Defendant has a choice: "accept the Removal or exercise its right to choose the State forum by making a Motion to Remand").

proceeded for 4 days. Based largely on the testimony from Respondents' own experts – the trial Court entered an injunction and made an interim award of costs/fees/expenses to Petitioners. Respondents then jointly appealed, challenging the injunction and the interim award. The 5th Circuit vacated the interim awards, hotly declaring Removal improper[2] and remanding with instructions to Remand the case back to State Court per 28 U.S.C. §1447(c). *Avitts I*, 53 F.3d at 694.

In accord with *Avitts I* instructions, Petitioners moved for a §1447(c) award of costs, fees and expenses, which the trial Court in its discretion partially granted (i.e., deleting some items and reducing the requested hourly rate). *Avitts II*. The trial Court – exercising its broad discretion and with its intricate knowledge of and perspective of the case after 5 years of litigation – made the §1447(c) award to Petitioners because *inter alia*:

> "(Respondents) . . . managed to spin out a case of nightmarish proportions and expense . . . (and) . . . succeeded . . . in delaying any adjudication of this matter at all. *** Under these circumstances, . . . it is immenently fair and reasonable to require Respondents to pay for the results of their action".

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[2] *Avitts I* declared "(Petitioners') Complaint stated no cause of action which could be read to confer federal question jurisdiction. . . . ", "no federal question has ever been stated", "no federal cause of action has ever been asserted", "plain that removal jurisdiction . . . simply did not exist", an "obvious lack of . . . jurisdiction", the federal trial Court "never had . . . jurisdiction over any of the claims. . . . ", and "jurisdiction cannot be created by a simple reference to federal law". 53 F.3d at 692-4.

Avitts II, p. 3. Respondents then appealed again, complaining of the trial Court's discretionary §1447(c) award. The 5th Circuit vacated the discretionary §1447(c) award, and ruled that Petitioners should receive no §1447(c) award at all, divining that Petitioners were "estopped" from any §1447(c) award as they had not filed a Motion to Remand. *Avitts III*, 111 F.3d at 32.3. Petitioners' timely Motion for Rehearing was denied on June 3, 1997.

Unfortunately relying on Respondents as 'experts' in this field, Petitioners (called "the little people" by the trial Court) assumed Respondents' repeated assertion of federal jurisdiction was correct and did not move to remand. Neither did Respondents, although they clearly could have done so[3].

ISSUES PRESENTED (Restated)

QUESTION 1 (Restated)

In vacating the largest 28 U.S.C. § 1447(c) award in history, did the 5th Circuit err when it

> (a) held that filing a Motion to Remand is a mandatory, threshold pre-requisite before one may be entitled to a 28 U.S.C. §1447(c) award for

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[3] *Getty*, 841 F.2d at 1263 (non-Removing Defendants "right" to Remand); *Am. Fire Ins. Co. v. Finn*, 181 F.2d 845, 846-7 (5th Cir. 1950) (Removing Defendant's right to Remand, called "reverse Remand") reversed on other grounds at 341 U.S. 6, 18 (1951) (Removing Defendant's Motion to Remand ordered granted and case sent back to Texas State Court); *Garside v. Osco Drug*, 702 F.Supp. 19, 20-2 (D.C. Mass. 1988).

erroneous removal, a requirement not placed in the statute by Congress?

(b) narrowly interpreted 28 U.S.C. §1447(c) to permit only an award of costs, fees and expenses directly incurred in challenging removal, contrary to interpretations espoused by the 2nd and the 3rd Circuits?

(c) decided the appeal based on an argument not raised in the trial Court, contrary to long-settled precedent?

(d) limited 28 U.S.C. §1447(c) awards to be against removing Defendants only, where non-removing Defendants accepted the removal and acted in concert with the removing Defendant?

(e) shifted the Congressionally – mandated focus away from the propriety of removal and onto the non-removing Plaintiffs' post-removal conduct, when considering a 28 U.S.C. §1447(c) award?

(f) interpreted 28 USC §1447(c) in a way contrary to the interpretations of other Circuits?

(g) *eo instante* made fact findings the trial Court never made and was never even asked to make, contrary to long settled precedent?

(h) substituted its discretion for that of the trial Court to hold that no 28 U.S.C. §1447(c) award was proper?

ARGUMENT AND AUTHORITIES

I – CONSIDERATIONS FOR GRANTING WRIT

Per U.S. Supreme Court Rule 10 and 14(j), Petitioners identify the pertinent Certiorari considerations at bar:

> *Rule 10.1(a)*: "When a U.S. Court of Appeals has rendered a decision in conflict with the decision of another . . . Court of Appeals on the same matter. . . . "
>
> *Rule 10.1(a)*: "When a U.S. Court of Appeals . . . has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision".
>
> *Rule 10.1(c)*: "When a . . . U.S. Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. . . . "
>
> *Rule 10.1(c)*: "When a . . . U.S. Court of Appeals . . . has decided a federal question in a way that conflicts with . . . decision of this Court".

II – THIS COURT SHOULD INTERPRET §1447(c), ITS AWARD REQUISITES AND REACH

§1447(c) Significantly Revised in 1988

In 1988, Congress significantly revised §1447(c)'s 'award on Remand' provisions. The previous "improvident Removal" (i.e., 'bad faith') requirement was deleted, the amended statute "mak(ing) no reference at all to the state of mind or intent of the party removing the action". *Morgan Guar. Trust v. Republic of Palau*, 971 F.2d 917, 923 (2nd Cir. 1992). Thus, "the trend among the Circuits

construing the amended version of §1447(c) . . . is to award attorneys fees without reference to a particular state of mind or improper purpose on the part of the Removing party". *Husk v. DuPont*, 842 F.Supp. 895, 899 N.6 (D.C. W.Va. 1994); *Moore v. Permanente Med. Grp.*, 981 F.2d 443, 446 (9th Cir. 1992); *Morris v. Bridgestone*, 985 F.2d 238, 240 (6th Cir. 1993).

The **SOLE** Congressional prerequisite for a §1447(c) award is "the mere absence of . . . jurisdiction". *Morgan*, 971 F.2d at 923. It is **undisputed** that this sole Congressional requisite was met here. *Avitts I*, 53 F.3d at 692-3; *Avitts II*, *Avitts III*, 111 F.3d at 32.

1988 Amendment Substantially Expanded Trial Court Discretion

As, however, "in practice, Removal (remains) . . . often as much a matter of **trial strategy** as it is of forum selection"[4], "Congress intended the 1988 Amendments would **expand** rather than limit the District Court's authority to (make an) award. . . . ", and thus "the **District Court's discretion . . . was significantly expanded**. . . . " *Morris*, 985 F.2d at 240; *MDC v. State Bank*, 771 F.Supp. 242, 244 (D.C. Ill. (1991); Prof. Siegel, "Commentary on 1988 Revision of §1447", 28 U.S.C. 1447 (1993 Supp.p.438). Trial Courts, under the 1988 Amendments, now enjoy "a great deal of discretion and flexibility . . . in fashioning awards . . . under §1447(c)" which they did not have before. *Campos v. Housland*, 824 F.Supp. 100, 103 (D.C. Tex. 1993); *Morgan*, 971 F.2d at 924.

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[4] *Garside*, 702 F.Supp. at 21.

Courts in Conflict over §1447(c) Interpretation, Requisites and Reach

Given that this Court has not earlier construed the broad language and intent of §1447(c), grave conflict and confusion has arisen in the Circuits over its interpretation, requisites and reach. This case is a textbook example:

(1) The 5th Circuit here held that a Plaintiff must file a Motion to Remand as a threshold requisite to any §1447(c) award (111 F.3d at 33-4, vacating §1447[c] award as Plaintiffs/Petitioners filed no Remand Motion and thus were "estopped" from any §1447[c] award at all) – **CONTRARY** to Congressional refusal to make a Remand Motion condition precedent to a §1447(c) award. 28 U.S.C. §1447(c) and the 2nd Circuit's focus in *Morgan* "strictly on the mere absence of jurisdiction", 971 F.2d at 923.

(2) The 5th Circuit here narrowly limited a §1447(c) award "to fees and costs incurred in federal Court that would not have been incurred had the case remained in State Court" (111 F.3d at 32) – **CONTRARY** to the 2nd Circuit in *Morgan* (971 F.2d at 924 (majority affirming $130,000 §1447[c] award), 926 (dissent acknowledging that "where Remand comes only after . . . trial and . . . appeal, **THE STATUTE APPEARS TO OPEN DEFENDANT TO LIABILITY FOR ALL OF PLAINTIFF'S FEES [AND THAT] CONGRESS MAY HAVE INTENDED THAT RESULT WHERE REMOVAL WAS IMPROPER**. . . . ") and the 3rd Circuit in *Mints v. Ed. Testing Service*, 99 F.3d 1253, 1258 (3rd Cir. 1996)

("§1447[c] does not provide that the Court may require Defendant to pay **only** Plaintiff's costs and . . . fees incurred in a Motion to Remand[;] rather . . . [it] provides the Court may require payment of costs and fees 'incurred as a result of Removal' [which] . . . could include items distinct from those incurred on a Motion to Remand").

(3) The 5th Circuit here focused on the non-Removing **Plaintiff's** post-Removal conduct (111 F.3d at 32: "if Plaintiff bears a substantial share of responsibility for the case remaining in federal Court, a Court abuses its discretion by awarding Plaintiff any sums under §1447[c]") – **CONTRARY** to the 6th Circuit in *Ahearn v. Charter Township*, 100 F.3d 451, 453 (6th Cir. 1996) (Removing **Defendant** bears burden of establishing federal jurisdiction), *Carson v. Dunham*, 121 U.S. 421, 425-6 (1887) (same); the earlier 5th Circuit ruling in *Miranti v. Lee*, 3 F.3d 925, 928 (5th Cir. 1993) ("propriety of **Defendant's removal** continues to be central. . . . "), and the 2nd Circuit in *Morgan*, 971 F.2d at 924 and n.3 (cautioning Courts not to lose sight that "**Defendant** removed case in the first instance" and affirming §1447[c] award even though Plaintiff had argued there was federal jurisdiction).

(4) The 5th Circuit here rejected the 'joint and several' nature of the §1447(c) award (111 F.3d at 32) – **CONTRARY** to *Wisconsin v. Missionaries to Pre-Born*, 789 F.Supp. 542, 543 (D.C. Wisc. 1992) (trial Court imposing

§1447[c] award "jointly and severally" on Defendants: "§1447[c] does not contain any express or even implied limitation on . . . authority to impose joint and several liability. . . . ") and the Congressional refusal to expressly exclude 'joint and several liability' from the trial Court's discretionary §1447(c) authority.

(5) The 5th Circuit here held that **only** a Removing Defendant can be liable for a §1447(c) award and that no award is available against a non-Removing Defendant who "accepts" the Removal[5] – **CONTRARY** to the 2nd Circuit in *Morgan*, 971 F.2d at 924-5 (affirming §1447[c] award against "the government of Palau" when it was "the people and Supreme Court [of Palau who] took actions that ultimately led to the §1447[c] award") and the Congressional refusal to engraft such a 'Removing Defendant – only' limitation into the statute.

There is much conflict and confusion in the federal Courts below as to §1447(c)'s proper interpretation, the requisites for such an award and its reach. This Honorable Court should grant Writ to resolve it. These critical issues have not been, but should be, settled.

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[5] *Getty*, 841 F.2d at 1263 (noting a non-Removing Defendant's "choice [to] accept Removal" or move to Remand); *Texas W&M Assn. v. Standard Ins. Co.*, 175 F.2d 835, 8367-8 (5th Cir. 1949) (second-sued corporation [Texas Wool] entitled to Remand after first-sued corporation Removed to federal Court).

Further Need for Interpretation and 5th Circuit Conflict with this Court

Interpretation of a statute is controlled by long-standing principles:

> "Our task is to give effect to the will of Congress and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive."[6]
>
> * * *
>
> "When . . . the terms of a statute (are) unambiguous, judicial inquiry is complete except in rare and exceptional circumstances. We do not believe that this is one of those rare cases where application of the Statute as written will produce a result demonstrably at odds with the intentions of its drafters. *** We cannot say that the payment of . . . (a §1447[c] award) is so bizarre that Congress could not have intended it. *** The remedy for any dissatisfaction with the results (in the trial court) . . . lies with Congress and not with this Court."[7]

Here, it is undisputed that §1447(c)'s plain language is quite plain"[8] and that the sole Congressional prerequisite

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[6] *Griffin v. Oceanic Contractors*, 458 U.S. 564, 570, 575-6 (1982) (reversing 5th Circuit, and **declining to limit statutory reach where Congress had not expressly done so**).

[7] *Demarest v. Manspeaker*, 498 U.S. 184, 190-1 (1992) (**declining to limit the provisions of a witness fee statute where Congress had not expressly done so**, and rejecting 5th Circuit's contrary holding).

[8] In re *Meyerland*, 960 F.2d 512, 519 (5th Cir. 1992). None of the parties at bar have asserted that §1447(c) is ambiguous.

– "strictly . . . the mere absence of . . . jurisdiction" (*Morgan*, 971 F.2d at 923) – has been met.

Had Congress, for example, desired to limit §1447(c) awards only as against a Removing Defendant, **or** to require consideration of a non-Removing Plaintiff's post-Removal conduct, **or** require a Remand Motion as a condition precedent, **or** to prohibit awards against non-Removing Defendants who "accept" Removal, it easily could have done so. It did not! The plain, unambiguous Congressional language in §1447(c) does not impose any of these **NEW** 5th Circuit limits and restrictions. Indeed, the trial Court's discretionary §1447(c) award against Respondents here – after 5 years of handling the case – is not "so bizarre that Congress could not have intended it." *Griffin*, 458 U.S. at 570, 565-6.

In addition to the obvious conflict and confusion in the Circuits, this Court should grant Writ to address the 5th Circuit's imposition of non-Congressional restrictions on §1447(c) and its conflict with the statutory interpretation guidelines handed down in *Griffin* and *Demarst* (both reversing earlier 5th Circuit cases restricting federal statutes).

III – 5TH CIRCUIT'S DEPARTURE FROM ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

The 5th Circuit substituted its discretion for that of the trial Court, decided the case on an argument no one made in the trial Court or the Briefs, made fact findings as if it were a trial Court and ignored the 'law of the case'. This was a rather amazing departure from the accepted and usual course of judicial proceedings and

contrary to long-established precedent by this Court and the 5th Circuit itself. This Court's power of supervision is called for.

Substitution of Discretion

It is well settled that a reviewing Court cannot simply substitute its discretion for that of the trial Court. Otherwise, the trial Court's "discretion would be meaningless", and the reviewing Court would be "transform(ed) into a trial Court- . . . where conduct would be reviewed as if those individuals were litigating . . . initially on the appellate level". *White v. Carlucci*, 862 F.2d 1209, 1211 (5th Cir. 1989) ("we may not simply . . . substitute [our] judgment for the trial Court's, else that Court's . . . discretion would be meaningless"); *Topalian v. Ehrman*, 3 F.3d 931, 935 (5th Cir. 1993) ("we will not substitute our judgment for that of the trial Court. . . . "); *Thomas v. Capital Security*, 836 F.2d 866, 884-5 (5th Cir. 1988) (en banc). When this happens – as here – there is a **GROSS**

> "inconsisten(cy) with . . . the principles of appellate review. . . . "

Topalian, 3 F.3d at 935.

Here, the trial Court exercised its broad discretion – based on its intricate knowledge of and perspective of the case after 5 years of litigation – and made its §1447(c) award because *inter alia*:

> "(Respondents) . . . managed to spin out a case of nightmarish proportions and expense . . . (and) . . . succeeded . . . in delaying any adjudication of this matter at all. *** Under these circumstances, . . . it is immenently fair

> and reasonable to require Respondents to pay for the results of their action".

Avitts II, p.3. The 5th Circuit simply substituted its judgment and discretion for that of the trial Court.

The 5th Circuit reliance on a single case – *Bankston v. Burch*, 27 F.3d 164 (5th Cir. 1994) – to support its action is sorely misplaced. In *Bankston*, the §1447(c) request was made to the 5th Circuit alone, thereby invoking the 5th Circuit's discretion, and **not** the trial Court's. *Id*, at 169 (Plaintiff made §1447[c] request directly to the 5th Circuit in his Brief). At issue in *Bankston* was the 5th Circuit's discretion – not the trial Court's!

5th Circuit Ignored 'Law of the Case'

The 5th Circuit decision at issue here was also contrary to its un-challenged rulings in *Avitts I* – clearly violating the settled 'law of the case' doctrine. For example:

(1) *Avitts I*: **Petitioners NEVER pleaded violation of federal law** (53 F.3d at 692-4: Petitioners "stated no [federal] cause of action. . . . ", "filed a First Amended Complaint . . . omitting all reference to federal law", "no federal question has ever been stated", and "there is no doubt that [Petitioners] . . . have chosen to pursue only State law causes of action" as "[federal] jurisdiction cannot be created by simple reference to federal law").

Avitts III: **Petitioners DID allege violation of federal law** (111 F.3d at 33: as an example of Petitioners' purported "active role" in keeping the case in federal Court, the 5th

Circuit declared "[Petitioners] alleged violations of . . . federal law. . . . ").

(2) *Avitts I*: **Respondents NEVER moved to dismiss for lack of jurisdiction** (53 F.3d at 693-4: "in a Motion to Dismiss filed by Respondents [on the eve of trial], the Court was asserted to have . . . jurisdiction. . . . ").

Avitts III: **Respondents DID move to dismiss for lack of jurisdiction** (111 F.3d at 33: as an example of Petitioners' purported "active role" in keeping the case in federal Court, the 5th Circuit stated "[Petitioners] opposed Respondents' Motion to Dismiss for lack of jurisdiction. . . . ").

These issues decided in *Avitts I* became 'law of the case' to govern *Avitts II* and *Avitts III*. *Christianson v. Colt*, 486 U.S. 800, 806 (1988); *Anderegg v. High*, 825 F.2d 77, 79-80 (5th Cir. 1987). The 5th Circuit inappropriately departed therefrom to justify its legislating new non-Congressional §1447(c) prerequisites and to support its 'fact finding' of Petitioners' purported "substantial responsibility".

5th Circuit Improperly Took on Fact Finding Role

The gist of the 5th Circuit's amazing decision is that the non-removing Petitioners – not Respondents – were "substantially responsible" for the case staying in federal Court. *Avitts III*, 111 F.3d at 33. **THE TRIAL COURT MADE NO SUCH FACT FINDING, NOR DID RESPONDANTS ASK IT TO**. Indeed, the trial Court – with its intricate knowledge of the case – assigned the blame to Respondents! The 5th Circuit improperly took on itself a fact finding role. *cf*: *Thomas*, 836 F.2d at 873,

884-5 (5th Circuit en banc: appellate Courts are typically not 'fact finding' bodies).

5th Circuit Decided Case on Theory Not Presented to the Trial Court or In the Briefs

Adopting *sua sponte* a new theory **NEVER** argued below or in the parties' Briefs, the 5th Circuit ruled that Petitioners were "estopped" from a §1447(c) award. *Avitts III*, 111 F.3d at 32-3. Obviously, the matter was not addressed by the trial Court (*Avitts II*) or even argued by the parties there. Indeed, "estoppel" appears for the first time in the 5th Circuit decision itself. *Avitts III*, 111 F.3d at 32-3.

Arguments not made in the trial Court are typically not even entertained on appeal, let alone used as 'fodder' to dispose of the case. *Hudson v. McMillian*, 503 U.S. 1, 12 (1992) (refusing to address arguments not made below); *Hulsey v. State*, 929 F.2d 168, 171 (5th Cir. 1991) ("because Hulsey failed to raise this issue before the District Court, we need not consider it . . . ").

WHEREFORE, PREMISES CONSIDERED, Petitioners pray that the Court grant their Application for Writ, vacate the 5th Circuit Decision, affirm the Trial Court's

Judgment, assess costs against Respondents and for such other and further relief as may be shown to be just.

Respectfully submitted,

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APPENDIX

Ex. A – Earlier 5th Circuit Decision in this Case: *Avitts I*, 53 F.3d 690 .....App. 1

Ex. B – Trial Court's Discretionary § 1447(c) Order: *Avitts II* .....App. 10

Ex. C – 5th Circuit Decision at Issue: *Avitts III*, 111 F3d 30 .....App. 14

Ex. D – Order on Motion for Rehearing: *Avitts IV* .....App. 23

APPENDIX A

W.H. AVITTS, et al., Plaintiffs-Appellees,

v.

AMOCO PRODUCTION CO., et al., Defendants,

Amoco Production Co., Defendant-Appellant.

Laverne LANG, et al., Plaintiffs-Appellees,

v.

AMOCO PRODUCTION CO., et al., Defendants,

Amoco Production Co., Defendant-Appellant.

Edward J. LUBOJACKY, et al., Plaintiffs-Appellees,

v.

AMOCO PRODUCTION CO., et al., Defendants,

Amoco Production Co., Defendant-Appellant.

Vernon A. SMITH, et al., Plaintiffs-Appellees,

v.

AMOCO PRODUCTION CO., et al., Defendants,

Amoco Production Co., Defendant-Appellant.

Tetsu TINDEL, Plaintiff-Appellee,

v.

AMOCO PRODUCTION CO., et al., Defendants,
Amoco Production Co., Defendant-Appellant.
O.F. WESTINGHOUSE, et al., Plaintiffs-Appellees,

v.

AMOCO PRODUCTION CO., et al., Defendants,
Amoco Production Co., Defendant-Appellant.
Joseph E. DURSO, et al., Plaintiffs-Appellees,

v.

AMOCO PRODUCTION CO., et al., Defendants,
Amoco Production Co., Defendant-Appellant.
Geraldine LOUDEN, Plaintiff-Appellee,

v.

AMOCO PRODUCTION CO., et al., Defendants,
Amoco Production Co., Defendant-Appellant.
O.L. SURFACE, et al., Plaintiffs-Appellees,

v.

AMOCO PRODUCTION CO., et al., Defendants,
Amoco Production Co., Defendant-Appellant.
Patty Ann WALKER, Plaintiff-Appellee,

v.

AMOCO PRODUCTION CO., et al., Defendants,
Amoco Production Co., Defendant-Appellant.
Steve TOWNSEND, et al., Plaintiffs-Appellees,

v.

AMOCO PRODUCTION CO., et al., Defendants,
Amoco Production Co., Defendant-Appellant.
Melvin CARPENTER, et al., Plaintiffs-Appellees,

v.

AMOCO PRODUCTION CO., et al., Defendants,
Amoco Production Co., Defendant-Appellant.
Joseph A. DURSO, et al., Plaintiffs-Appellees,

v.

AMOCO PRODUCTION CO., et al., Defendants,
Amoco Production Co., Defendant-Appellant.
Margaret L. DURSO, Plaintiff-Appellee,

v.

AMOCO PRODUCTION CO., et al., Defendants,
Amoco Production Co., Defendant-Appellant.
Jimmy Dean LONG, et al., Plaintiffs-Appellees,

v.

AMOCO PRODUCTION CO., et al., Defendants,
Amoco Production Co., Defendant-Appellant.
John W. COLLINS, et al., Plaintiffs-Appellees,

v.

AMOCO PRODUCTION CO., et al., Defendants,
Amoco Production Co., Defendant-Appellant.
W.H. AVITTS, et al., Plaintiffs-Appellees,

v.

AMOCO PRODUCTION CO., et al., Defendants,
Apache Corporation, MW Petroleum Corporation and Amoco Production Company, Defendants-Appellants.

Nos. 94-60058, 94-60059.

United States Court of Appeals,
Fifth Circuit.

May 22, 1995.

Owners of surface and royalty interests in oil field brought action against past and current operators of field, alleging environmental contamination, and matter was removed to federal court. Following entry of preliminary injunction requiring completion of environmental study, the United States District Court for the Southern District of Texas, Samuel B. Kent, J., 840 F.Supp. 1116, ordered defendants to pay interim costs and attorney fees. Defendants appealed. The Court of Appeals held that district court had no subject matter jurisdiction in action, in which only mention of federal law in any of complaints was oblique reference to violation of unspecified "Federal

law," and action should have been immediately remanded to state court.

Vacated and remanded.

Alton J. Hall, Jr., Wickliff & Hall, Charles E. Sullivan, Jr., Jennifer Bruch Hogan, Fulbright & Jaworski, Houston, TX, for appellant Amoco Production Co.

Alton C. Todd, Todd & Hagood, Alvin, TX, for appellees Westinghouse, W.H. Avitts, et al.

Roxanne Armstrong, Houston, TX, Andreas H. Leskovsek, Winston & Strawn, Washington, DC, for appellants Apache Corp. and MW Petroleum.

G. William Frick, Philip A. Cooney, Washington, DC, for amicus curiae American Petroleum Institute.

Appeals from the United States District Court for the Southern District of Texas.

Before LAY,[1] DUHE and DeMOSS, Circuit Judges.

PER CURIAM:

This matter comes before the Court on a consolidated appeal from interim orders entered by the district court. In 94-60058, Appellants appeal from the entry of a preliminary injunction requiring them to complete a "phase II" environmental study. In 94-60059, Appellants appeal from an order requiring them to pay approximately $650,000[2] in interim costs and attorney's fees. We find that the

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[1] Circuit Judge of the Eighth Circuit, sitting by designation.

[2] The court awarded $328,266 in attorney's fees and $315,875.99 in expenses. Avitts v. Amoco Production Co., 840 F.Supp. 1116, 1124 (S.D.Tex.1994).

district court lacks subject matter jurisdiction over this action, and therefore vacate the orders of the district court and remand with instructions to remand this action to the state court from which it was removed.

I. BACKGROUND

Appellees originally filed suit in Texas state district court to recover monetary damages for alleged injuries to their property caused by the defendants' oil and gas operations in the West Hastings Field. The matter was removed to the Southern District of Texas on the basis that Appellees' complaint stated,

> It is expected that the evidence will reflect that the damages caused by the Defendants are in violation of not only State law but also Federal law.

(emphasis supplied). Despite the nebulous referral to "federal law," the complaint stated no cause of action which could be read to confer federal question jurisdiction on the district court. In fact, in concert with their notice of removal Appellants filed a Fed.R.Civ.P. 12(e) motion for a more definite statement, which *inter alia* stated,

> Plaintiffs claim Defendants violated "State law" and "Federal law" in allegedly causing these spills. However, Plaintiffs fail to specify which State of Federal laws Defendant allegedly violated. Consequently, Defendants cannot possibly formulate a response or know what defenses may apply.

Although the district court summarily denied Appellants' motion for a more definite statement, Appellees subsequently filed a first amended complaint, this time omitting all reference to federal law. Although the Appellees' complaint has been amended several times during the pendency of this litigation, no federal question has ever been stated.[3]

II. DISCUSSION

"Any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the place where such action is pending." 28 U.S.C. § 1441(a). Original jurisdiction over the subject matter is mandatory for the maintenance of an action in federal court. Subject matter jurisdiction may not be waived, and the district court "shall dismiss the action" whenever "it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter." Fed.R.Civ.P. 12(h)(3).

Original jurisdiction, in non-maritime claims, lies where the conditions of 28 U.S.C. §§ 1331 or 1332 are satisfied. In the present action, the court claims original jurisdiction pursuant to § 1331, also known as federal question jurisdiction. There is no dispute that original

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[3] Plaintiff's last complaint, the seventh amended complaint, contains state law causes of action for "nuisance," "trespass," "negligence," "breach of contract" and "fraud and misrepresentation" and prays for actual damages in the amount of ten million dollars and exemplary damages in the amount of one hundred million dollars.

jurisdiction does not lie under § 1332, diversity of citizenship, because complete diversity does not exist. Under 28 U.S.C. § 1331, "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

Plaintiff is generally considered the master of his complaint, and "whether a case arising . . . under a law of the United States is removable or not . . . is to be determined by the allegations of the complaint or petition and that if the case is not then removable it cannot be made removable by any statement in the petition for removal or in subsequent pleadings by the defendant." Great Northern Ry., Co. v. Alexander, 246 U.S. 276, 281, 38 S.Ct. 237, 239, 62 L.Ed. 713 (1918); *see also* American Fire & Casualty Co. v. Finn, 341 U.S. 6, 14, 71 S.Ct. 534, 540, 95 L.Ed. 702 (1951). Of course, this does not mean that a plaintiff can avoid federal jurisdiction by simply "artfully pleading" a federal cause of action in state law terms. See Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394, 397 n. 2, 101 S.Ct. 2424, 2427 n. 2, 69 L.Ed.2d 103 (1981). However, it is also plain that when both federal and state remedies are available, plaintiff's election to proceed exclusively under state law does not give rise to federal jurisdiction.

In the present case, there is no doubt that Appellees have chosen to pursue only state law causes of action. The only mention of federal law in any of Appellees' complaints was the above mentioned oblique reference to Appellants' violation of unspecified federal laws. No federal cause of action has ever been asserted, and it is plain that removal jurisdiction under 28 U.S.C. Sec. 1441 simply did not exist. The district court had no jurisdiction over

the subject matter of the complaint, and the action should have been immediately remanded to state court.

Despite the obvious lack of original jurisdiction under Sec. 1331, two grounds for maintaining federal jurisdiction have been forwarded. First, in a motion to dismiss filed by Appellants, the court was asserted to have maintained jurisdiction under 28 U.S.C. Sec. 1367(c) which provides in part,

The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if –

. . . .

(3) the district court has dismissed all claims over which it has original jurisdiction.

This provision is plainly inapplicable because, by its terms, it presupposes that the district court obtained supplemental jurisdiction over the state law claims via original jurisdiction over federal claims arising from the same case or controversy. As stated above, the district court has never had original jurisdiction over any of the claims in this action because no federal claims have ever been asserted.

Second, subject matter jurisdiction was supposedly achieved through Appellees' reference to CERCLA and the Oil Pollution Act of 1990 (OPA) in the Joint Pretrial Order (PTO). Notwithstanding the highly questionable applicability of either of these statutes to the facts and circumstances of this case, adoption of this argument would require us to rewrite the PTO. Under the PTO's plain terms, CERCLA and OPA are offered only as a means to calculate the "Measure of Damages" owed to

the Appellees. Appellees never asserted a cause of action under either statute, and subject matter jurisdiction cannot be created by simple reference to federal law. Subject matter jurisdiction can be created only by pleading a cause of action within the district court's original jurisdiction. No such cause of action has *ever* been plead in this matter, and therefore subject matter jurisdiction is plainly absent.

III. CONCLUSION

The district court lacked subject matter jurisdiction over this action and was therefore without authority to enter its orders. The orders of the district court are vacated, and this matter is remanded to the district court with instructions to remand this action to the state court from which it was removed in accordance with 28 U.S.C. § 1447(c).

VACATED and REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

W. H. AVITTS, et al.	§	
	§	
v.	§	CIVIL ACTION
AMOCO PRODUCTION CO., et al.	§	NO. G-90-317
	§	

ORDER

This is an environmental law dispute in which Plaintiff W. H. Avitts ("Avitts") brought suit against Amoco Production Company ("Amoco") and others for alleged nuisance, trespass, and other violations. The suit was originally filed in the 149th Judicial District Court of Brazoria County, Texas, and was removed to this Court by Amoco under a theory of federal question jurisdiction. The matter proceeded to trial when, on the fourth day of trial, the Court entered Rule 65 injunctive relief requiring a Phase II environmental study under the belief that this case was governed, in part, by the Oil Pollution Act of 1990, 33 U.S.C. § 2701 *et seq.* Defendants filed an Interlocutory Appeal of this Court's Orders, and the Fifth Circuit subsequently determined that subject matter jurisdiction is absent in this case and instructed this Court to remand the instant case to state court. Before the Court now is Plaintiff's Motion for Just Costs and Actual Expenses for improper removal pursuant to 28 U.S.C. 1447(c). For the reasons stated below, the Court finds that Plaintiff's Motion should be **GRANTED**.

This case has been on the Court's docket for almost five years now and is no closer to resolution than it was when it was removed from state court. Unfortunately, enormous expenses of time – including the Court's – and money have been incurred in the fruitless task of hearing the motions and trial of this case, only to discover at this very late date that removal was improper to begin with because the Court lacked subject matter jurisdiction. Again unfortunately, someone must pay for this monumental waste of time and effort – which could have been expended in a just and complete resolution of the case by this point had it remained in the state court where it was filed and where it properly belongs. Instead, the parties now face the prospect of beginning at the point where they started five years ago with nothing but bills, and hopefully additional wisdom, to show for their efforts.

Plaintiff Avitts asks this Court to exercise its discretion under 28 U.S.C. § 1447(c) to award the Plaintiffs just costs and attorneys fees expended in prosecuting this case in a forum where they never belonged. The Court agrees. 28 U.S.C. § 1447(c) states in relevant part that "[a]n order remanding the case may require payment of just costs and actual expenses, including attorney fees, incurred as a result of the removal." Despite Amoco's unjustifiable assertion to the contrary, a finding of bad faith is *not* required under amended § 1447(c) for a court to imposts [sic] costs. *Miranti v. Lee*, 3 F.3d 925 (5th Cir. 1993); *Moore v. Permanente Medical Group, Inc.*, 981 F.2d 443 (9th Cir. 1992); *Morgan Guaranty Trust Co. of New York v. Republic of Palau*, 971 F.2d 917 (2nd Cir. 1992).

In this case, the Court finds that, although Plaintiffs stated in their state-court Complaint that evidence was

"expected" to show that the actions of Defendants violated federal law, a reading of the plain language of the Original Complaint clearly shows that *each and every one* of Plaintiff's counts were stated in terms of state common law claims. *No* federal statute or regulation is cited as a source of violation. Based on the slim thread of a future assertion of federal violation, Defendants removed this case and have managed to spin out a case of nightmarish proportions and expense for all concerned. As the Court has already noted, Defendants' efforts have succeeded only in delaying any adjudication of this matter at all.

Under these circumstances, the Court believes that it is eminently fair and reasonable to require Defendants to pay for the results of their actions. Consequently, the Court finds that Defendants are jointly and severally liable to Plaintiffs for their just costs and attorney fees incurred in this matter, including those post-trial expenses Plaintiffs have noted in the total sum of $641,509.46.[1]

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[1] This figure is broken down as follows:

a. Attorney fees to the end of trial @ $250/hour: $293,353.50. The Court notes that this is the Court's maximum per hour allowance and that if, as Plaitniffs' counsel asserts, it is customary for environmental lawyers in the area to charge $500/hour, then the Court dearly regrets that it, too, is not practicing in the environmental law area.

b. Expenses: $273,254.17

c. Attorney fees post-trial @ $250/hour: $65,445.

d. Expenses post-trial: $9,639.04.

e. MINUS $181.75 Bill of Costs disallowed by the Fifth Circuit.

For these reasons, the Court finds that the above-captioned cause of action is hereby **REMANDED** to the 149th Judicial District Court of Brazoria County, Texas, for lack of subject matter jurisdiction. Additionally, it is **ORDERED** that Defendants shall pay to Plaintiffs costs and attorney fees in the amount of $641,509.46 within thirty (30) days of receipt of this Order, or summons shall issue. It is further **ORDERED** that the parties file no further pleadings in this matter, including motions to reconsider and the like. Instead, the parties are instructed to seek whatever relief they feel themselves entitled on the issue of costs and attorney fees in the United States Court Appeals for the Fifth Circuit, as may be appropriate in due course. The parties are instructed to seek whatever relief they desire on all other matters in this case in the courts of the State of Texas.[2]

IT IS SO ORDERED.

DONE this 28th day of June, 1995, in Galveston, Texas.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

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[2] *See* 28 U.S.C. § 1447(d) (stating that a remand for lack of subject matter jurisdiction is not reviewable on appeal).

APPENDIX C

W.H. AVITTS, et al., Plaintiffs-Appellees,

v.

AMOCO PRODUCTION CO., et al.,
Defendants-Appellants.

No. 95-40574.

United States Court of Appeals,
Fifth Circuit.

April 28, 1997.

Owners of surface and royalty interests in oil field brought action against past and current operators of field, alleging environmental contamination, and matter was removed to federal court. Following entry of preliminary injunction requiring completion of environmental study, the United States District Court for the Southern District of Texas, Samuel B. Kent, J., 840 F.Supp. 1116, ordered defendants to pay interim costs and attorney fees. Defendants appealed. The Court of Appeals, 53 F.3d 690, vacated and remanded. Upon remand, the District Court granted plaintiffs' motion for imposition of attorney fees and costs, and remanded matter to state court. Defendants appealed order imposing costs and fees. The Court of Appeals, W. Eugene Davis, Circuit Judge, held that: (1) defendants added to action following its removal were not subject to award; (2) upon determination that removal was improper, opposing party is entitled to award of costs incurred in federal court that would not have been incurred had case remained in state court; and (3) plaintiffs who took active role in persuading district court to retain jurisdiction were not entitled to award of attorney fees and costs.

Reversed and remanded.

Otto D. Hewitt, III, Albin, TX, Alton C. Todd, The Law Firm of Alton C. Todd, Alvin, TX, for Plaintiffs-Appellees.

Roxanne L. Armstrong, Houston, TX, for Defendants-Appellants.

A. Andrew Gallo, Houston, TX, Joy M. Soloway, Charles E. Sullivan, Jr., Fulbright & Jaworski, Houston, TX, Alton J. Hall, Jr., Delise, Amedee, Bertrand, Hall & Hidalgo, Metairie, LA, Lynn Bortka, Wickliff & Hall, Houston, TX, for Amoco Production Co.

Appeals from the United States District Court for the Southern District of Texas.

Before DAVIS, SMITH and DUHÉ, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Defendants-appellants appeal an order imposing costs and attorney's fees against them for improper removal under 28 U.S.C. § 1447(c). We reverse the order and remand this case to the district court for the limited purpose of taxing costs under Fed.R.Civ.P. 54.

I.

Appellees are landowners who contend that their property was harmed by Amoco's operations in the West Hastings Field. Appellees initiated this litigation by filing separate suits in Texas state district court.

In their state court complaints, appellees alleged that their damages caused by Amoco were in violation of "not

only State law but also Federal law." Based on federal question jurisdiction, Amoco removed the case to federal court in October 1990. The district court then consolidated appellees' suits.

Along with its notice of removal, Amoco filed a Fed.R.Civ.P. 12(e) motion for a more definite statement, to determine what federal law Appellees claimed Amoco had violated. The magistrate judge summarily denied Amoco's motion, directing Amoco to seek this clarification through interrogatories. Consistent with the magistrate's direction, Amoco served appellees with interrogatories asking appellees to specify their federal causes of action. In response, appellees stated that they "believed" they had a claim against Amoco under at least four, and maybe more, federal laws.[1]

Appellees filed the first of several amendments in July 1991. The first amendment removed the reference to federal law contained in the original complaint; nonetheless, appellees continued to allege in their pleadings that the district court had jurisdiction over these actions pursuant to 28 U.S.C. § 1331. Appellees' third amendment, filed October 17, 1991, named for the first time Apache Corporation ("Apache") and MW Petroleum Corporation ("MW") as co-defendants.

After the pre-trial conference, all the defendants moved to dismiss the action on grounds that the district

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[1] Appellees cited "18 U.S.C. § 1962 ('RICO'), 42 U.S.C. § 300, et seq., ('Family Planning and Population Act'), 33 U.S.C. § 1251 ('Clean Water Act 1977'), 42 U.S.C. § 7401, et seq. ('Clean Air Act'), as 'applicable' to this suit."

court had no federal question or diversity jurisdiction over any part of the action. Appellees opposed the motion, arguing that the district court had authority to entertain the action under its pendent jurisdiction. Appellees persuaded the district court to deny the motion to dismiss and retain the case in federal court. In fact, the district court embraced the appellees' position and characterized the defendants' jurisdictional arguments as "meritless."

Four days after the trial began, the district court, on its own motion, issued a mandatory injunction requiring Amoco, Apache, and MW to conduct an environmental study of the relevant property. The district court also awarded $644,141.99 in interim attorney's fees and expenses to appellees under the authority of the Federal Oil Pollution Act of 1990, 33 U.S.C. § 2701-2761. Amoco, Apache, and MW appealed these orders. In Avitts v. Amoco Production Co., 53 F.3d 690, 692 (5th Cir.1995), this court held that appellees had never asserted a federal cause of action and as a result the district court did not have subject matter jurisdiction. The district court's orders were thus vacated and the case was remanded to the district court with instructions to remand the case to state court.

Upon remand to the district court, appellees moved for "just costs and actual expenses, including attorney fees" under 28 U.S.C. § 1447(c). The district court overruled the defendants' objection, granted the motion, and held Amoco, Apache, and MW jointly and severally liable under § 1447(c) for $641,509.46, representing appellees' costs and attorney's fees. The district court then

remanded the action to state court. Amoco, Apache, and MW timely appealed the district court's § 1447(c) order.

II.

The question we face is whether the district court erred in holding Amoco, Apache, and MW liable for attorney's fees and costs under § 1447(c). We look first, of course, to the statute itself. Section 1447(c) provides:

> A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of removal.

28 U.S.C.A. § 1447(c) (West 1994) (emphasis added).

Plaintiffs added Apache and MW as defendants after Amoco removed this action to federal court. In Miranti v. Lee, 3 F.3d 925, 929 (5th Cir.1993), we held that a court's discretion to award attorney's fees under § 1447(c) is triggered only if the court first finds that the defendant's decision to remove was legally improper. Id. at 929. As Miranti makes clear, the propriety of the defendant's action in removing the case is central to the determination of whether fees are awarded. Id. at 928. In undertaking this analysis, we look only to "the complaint at the time the petition for removal was filed." Id. Because neither Apache nor MW played a role in the decision to remove, they are not subject to an award under § 1447(c).

The determination of whether Amoco's removal of this case was legally improper was decided in the earlier appeal and is not before us. See Avitts, 53 F.3d at 693 (holding that "[n]o federal cause of action has ever been asserted [by appellees], and it is plain that removal jurisdiction under 28 U.S.C. § 1441 simply did not exist"). But the determination that the removal was improper does not end our inquiry. We still must determine whether under the circumstances of this case the district court abused its discretion by ordering Amoco to pay $641,509.46 in costs and fees.

Once a court determines that the removal was improper, thus satisfying the Miranti threshold requirement, § 1447(c) gives a court discretion to determine what amount of costs and fees, if any, to award the plaintiff. Congress has plainly limited such an award to those costs and fees "incurred as a result of removal." See 28 U.S.C.A. § 1447(c) (West 1994). We interpret this language to limit the litigation expenses that may be awarded under this section to fees and costs incurred in federal court that would not have been incurred had the case remained in state court. This interpretation of the plain language of § 1447(c) is buttressed by its legislative history. For example, the House Report states that § 1447(c) "will ensure that a substantive basis exists for requiring payment of actual expenses incurred in resisting an improper removal; civil rule 11 can be used to impose more severe sanction when appropriate." H.R.Rep. No. 100-889, reprinted in 1988 U.S.C.A.N. 6033.

We conclude therefore that a party's costs of opposing removal, seeking remand, and other expenses incurred because of the improper removal may be

awarded. By contrast, ordinary litigation expenses that would have been incurred had the action remained in state court are not recoverable because such expenses are not incurred "as a result of the removal."

If the opinion ended here, we would remand this case to permit the district court to reduce the award to compensate Appellees for expenses incurred "as a result of the removal." But for reasons that follow, we need not remand this case for that purpose.

If a plaintiff bears a substantial share of the responsibility for the case remaining in federal court, a court abuses its discretion by awarding the plaintiff any sums under § 1447(c). In other words, a plaintiff may in certain cases be estopped from recovering costs and attorney's fees under § 1447(c) when his conduct after removal plays a substantial role in causing the case to remain in federal court.

In Bankston v. Burch, 27 F.3d 164, 169 (5th Cir.1994), the plaintiff, a limited partner in a limited partnership, sued the general partner alleging fraud or negligent misrepresentation, breach of fiduciary duty, mismanagement and waste of partnership assets, and breach of contract. The plaintiff asserted all of his claims as personal claims in his original petition. The general partner, a citizen of California, removed the case based on the diversity between himself and the plaintiff, a citizen of Texas. Plaintiff did not seek remand. Shortly before trial, the defendant filed a motion to dismiss on grounds that subject matter jurisdiction was lacking. He argued, among other things, that the plaintiff had failed to join

the limited partnership and the individual limited partners as indispensable parties. The district court referred the motion to the merits and proceeded to trial. A jury verdict was rendered primarily in favor of the plaintiff. In a post-trial motion, the plaintiff admitted for the first time that some of his claims were derivative in nature. Following entry of judgment, the defendant appealed, and argued that the district court had no jurisdiction over the plaintiff's derivative claims.

On appeal, this court concluded that the limited partnership, a citizen of Texas and California, was an indispensable party to the plaintiff's derivative suit, and therefore once its citizenship was considered complete diversity was lacking. We then vacated the district court's judgment and remanded the case with instructions to remand to state court. The plaintiff in his brief asked this court to award him costs and fees under § 1447(c) if the court concluded that a remand was appropriate. We declined to make the requested award on grounds that the plaintiff "himself bears a substantial share of the responsibility for this case's lengthy but futile sojourn in the federal courts." Id. at 169. We observed that "[h]ad [the plaintiff] pleaded his derivative claims as derivative claims, rather than attempting to cast them as personal to himself, the indispensability of the partnership as a party would have been immediately apparent." Id.

The same reasoning applies to this case. Given the active role appellees took in persuading the district court to retain jurisdiction of the case, fees are not appropriate. Appellees alleged violations of both state and federal law in their original state court complaint; did not move to

remand; alleged that the district court had federal question jurisdiction in each amended complaint; opposed the defendants' motion to dismiss for lack of jurisdiction, and persuaded the court it had jurisdiction to hear the case. Because appellees bear a substantial share of the responsibility for the case remaining in federal court, we conclude that the district court abused its discretion in awarding fees and costs to appellees under § 1447(c).

III.

For the reasons stated above, we reverse the § 1447(c) award of fees and costs and remand this case to the district court to tax costs under Fed.R.Civ.P. 54.

REVERSED and REMANDED.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 95-40574

W H AVITTS; OPHELIA AVITTS;
H J RICHARDSON;
O F WESTINGHOUSE; LILLIE
WESTINGHOUSE

Plaintiffs - Appellees

v.

AMOCO PRODUCTION COMPANY;

Defendant - Third Party Plaintiff -
Appellant

KERMITT W WALROND; EXXON COMPANY
U S A

Defendants

EXXON CORPORATION;

Third Party Defendant

EXXON

Counter Claimant

and

M W PETROLEUM CORPORATION; APACHE
CORPORATION

Defendants - Appellants

LAVERNE LANG; MAXINE LARUE; LINA ANNE DEMITRIADES

Plaintiffs - Appellees

v.

AMOCO PRODUCTION COMPANY, ET AL

Defendants

AMOCO PRODUCTION COMPANY

Defendant - Appellant

EDWARD J LUBOJACKY; RUBY LUBOJACKY, His wife;

v.

AMOCO PRODUCTION COMPANY, ET AL

Defendants

AMOCO PRODUCTION COMPANY;

Defendant - Appellant

VERNON A SMITH; HENRIETTA SMITH;

Plaintiffs - Appellees

v.

AMOCO PRODUCTION COMPANY, ET AL

Defendants

AMOCO PRODUCTION COMPANY;

Defendant - Appellant

TETSU TINDEL;

Plaintiff - Appellee

v.

AMOCO PRODUCTION COMPANY, ET AL

Defendants

AMOCO PRODUCTION COMPANY;

Defendant - Appellant

O F WESTINGHOUSE; LILLY WESTINGHOUSE;

Plaintiffs - Appellees

v.

AMOCO PRODUCTION COMPANY, ET AL

Defendants

AMOCO PRODUCTION COMPANY;

Defendant - Appellant

JOSEPH E DURSO; FRANCES DURSO; GERALDINE LOUDEN;

Plaintiffs - Appellees

v.

AMOCO PRODUCTION COMPANY, ET AL

Defendants

AMOCO PRODUCTION COMPANY;

Defendant - Appellant

O L SURFACE; ELOTS SURFACE, His wife;
Plaintiffs - Appellees

v.

AMOCO PRODUCTION COMPANY, ET AL
Defendants

AMOCO PRODUCTION COMPANY;
Defendant - Appellant

PATTY ANN WALKER;
Plaintiff - Appellee

v.

AMOCO PRODUCTION COMPANY, ET AL
Defendants

AMOCO PRODUCTION COMPANY;
Defendant - Appellant

STEVE TOWNSEND; DIANA TOWNSEND;
Plaintiffs - Appellees

v.

AMOCO PRODUCTION COMPANY, ET AL
Defendants

AMOCO PRODUCTION COMPANY;
Defendant - Appellant

MELVIN CARPENTER; BILLIE C CARPENTER;

Plaintiffs - Appellees

v.

AMOCO PRODUCTION COMPANY, ET AL

Defendants

AMOCO PRODUCTION COMPANY;

Defendant - Appellant

JOSEPH E DURSO; ANN DURSO;

Plaintiffs - Appellees

v.

AMOCO PRODUCTION COMPANY, ET AL

Defendants

AMOCO PRODUCTION COMPANY;

Defendant - Appellant

MARGARET L DURSO;

Plaintiff - Appellee

v.

AMOCO PRODUCTION COMPANY, ET AL

Defendants

AMOCO PRODUCTION COMPANY;

Defendant - Appellant

JIMMY DEAN LONG; BETTYE L LONG;

Plaintiffs - Appellees

v.

AMOCO PRODUCTION COMPANY, ET AL

Defendants

AMOCO PRODUCTION COMPANY;

Defendant - Appellant

JOHN W COLLINS; ANITA COLLINS

Plaintiffs - Appellees

v.

AMOCO PRODUCTION COMPANY, ET AL

Defendants

AMOCO PRODUCTION COMPANY,

Defendant - Appellant

Appeal from the United States District Court for the Southern District of Texas, Galveston

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(Filed Jun. 3, 1997)

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 4/28/97, 5 Cir., ___, ___ F.3d ___)

Before DAVIS, SMITH and DUHÉ, Circuit Judges.

PER CURIAM:

(✔) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge

in regular active service of the court having requested that the court be polled on Rehearing En Banc (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

( ) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States Circuit Judge

Supreme Court, U.S.
FILED
OCT 10 1997
CLERK

No. 97-423

(2)

In the Supreme Court of the United States

OCTOBER TERM, 1996

W. H. AVITTS, ET AL.,

Petitioners,

v.

AMOCO PRODUCTION CO., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS APACHE CORPORATION AND MW PETROLEUM CORPORATION

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Attorneys for Respondent
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10 pp

QUESTION PRESENTED

Does 28 U.S.C. §1447(c), which permits a federal court remanding a case to award costs and expenses "incurred as a result of removal," authorize such an award against a defendant joined *after* a removal that the plaintiff never challenged?

RULE 29.6 STATEMENT

Respondent Apache Corporation has no parent company. Respondent MW Petroleum Corporation is a wholly-owned subsidiary of Apache Corporation. Listed below are the companies and partnerships that are partly but not wholly owned by Apache Corporation or one of its wholly-owned subsidiaries:

Apache International, Inc.
Apache Oil Australia Pty Limited
Apache Qarun Corporation LDC
Apache Offshore Investment Partnership
Apache 681/682 Joint Venture
Main Pass 151 Pipeline Company
Main Pass Block 151 - Offshore
Main Pass 151 Gas Pipeline Company
Apache Series 1996-A Trust
Apache Poland Sp. z o.o. and FX Energy Poland Sp. z o.o. (East) Commercial Partnership

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 97-394

W. H. AVITTS, ET AL.,

Petitioners,

v.

AMOCO PRODUCTION CO., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION FOR RESPONDENTS APACHE CORPORATION AND MW PETROLEUM CORPORATION

The petitioners challenge the Fifth Circuit's decision that the federal remand statute's fee-shifting provision does not authorize an award of costs and expenses against a defendant who was not a party at the time of removal. Because the decision is so clearly correct and raises no issue on which the courts of appeals are in conflict, the petition for certiorari should be denied.

STATEMENT

The petitioners, a group of landowners, filed this action in Texas state court against respondent Amoco Production Company ("Amoco") on July 2, 1990. The landowners contended that Amoco's oil field operations had harmed their properties. Because the complaint alleged violations of federal law, Amoco removed the case to the United States District

Court for the Southern District of Texas on October 15, 1990. The landowners did not contest the removal. Pet. App. 16.

On October 17, 1991, more than a year after the uncontested removal, the landowners filed their Third Amended Complaint, which, for the first time, named respondents Apache Corporation ("Apache") and MW Petroleum Corporation ("MW") as co-defendants. *Id.* at 16. The Third Amended Complaint, which was served on Apache and MW on January 27, 1992, alleged federal jurisdiction. Throughout the district court proceedings, the landowners continued to contend that federal jurisdiction existed, defeating defendants' motion to dismiss for lack of jurisdiction. *Id.* at 16-17.

The case came to trial on November 8, 1993. Four days after the trial began, the district court aborted the proceedings and ordered Amoco, Apache, and MW to conduct an environmental study of the property and to pay the plaintiffs' attorney's fees and expenses, citing the federal Oil Pollution Act of 1990, 33 U.S.C. § 2701-2761. Pet. App. 17. Amoco appealed both orders; Apache and MW appealed only the order to pay attorney's fees and expenses. On May 22, 1995, the Court of Appeals for the Fifth Circuit held that the district court lacked subject matter jurisdiction and instructed the district court to remand the case to state court. *Id.* at 9.

On remand to the district court, the landowners sought costs and expenses under 28 U.S.C. § 1447(c). The statute permits a remand order to require payment of "just costs and any actual expenses, including attorney fees, incurred as a result of removal." The district court found Amoco, Apache, and MW jointly and severally liable to the landowners for $641,509.46, which represented essentially all of the landowners' litigation costs, including reasonable attorney's fees, incurred to that date. Pet. App. 12 & n.1.

Amoco, Apache, and MW appealed the § 1447(c) award, and the Fifth Circuit reversed. It ruled that Apache and MW could not be ordered to pay any costs relating to the removal

because they became parties *after* the removal. Because "a court's discretion to award attorney's fees under § 1447(c) is triggered only if the court first finds that the defendant's decision to remove was legally improper," the court reasoned, defendants sued after the case had already been removed were not subject to such an award. Pet. App. 18. The court then denied the § 1447(c) award against Amoco on the ground that the landowners themselves, who had never sought a remand, "bear a substantial share of the responsibility for the case remaining in federal court." *Id.* at 22.

REASONS FOR DENYING THE PETITION

As explained in Amoco's brief in opposition, the landowners have identified no issues that even remotely begin to merit this Court's consideration. The Fifth Circuit correctly held that the landowners could not recover costs and expenses under § 1447(c) from any of the defendants under the particular circumstances of this case, and no decision by any court of appeals conflicts with that ruling. But even if this case otherwise presented issues worthy of review, absolutely no reason exists to revisit the Fifth Circuit's holding that Apache and MW are not liable for removal costs. There can be no doubt that § 1447(c) does not authorize an award of removal costs against defendants sued *after* removal.

Section 1447(c) provides that an order remanding a case "may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of removal." In determining whether an award of costs and expenses is justified, courts first examine the defendant's conduct in removing the case. See, e.g., *Excell, Inc.* v. *Sterling Boiler & Mechanical, Inc.*, 106 F.3d 318, 322 (10th Cir. 1997) ("the key factor is the propriety of the defendant's removal"); *Miranti* v. *Lee*, 3 F.3d 925, 928 (5th Cir. 1993) (courts "invariably take into consideration the defendants' decision to remove"); see also Commentary to the 1988 Revision of Section 1447 by David D. Siegel following 28 U.S.C.A. § 1447 (West 1994) ("subdivision

(c) now authorizes the court to add 'actual expenses, including attorney's fees,' *should it find that it was improper for the defendant to remove the case"* (emphasis added)). There is no basis for shifting costs to a defendant who was not a party at the time of removal, because there is no relevant conduct by such a defendant for the court to assess. No court has held otherwise.[1]

Noting that § 1447(c) does not expressly limit liability for costs and expenses to removing defendants, the landowners argue that Apache and MW should be liable because they "accept[ed]" removal. Pet. 10. But it is ludicrous for the landowners to try to shift their fees to Apache and MW for failing to extricate this case from federal court. The landowners themselves, who litigated this matter in federal court for 15 months before Apache and MW even became parties, never challenged the removal, even though their right to remand for lack of jurisdiction never expired. See § 1447(c). And, of course, it was the landowners, not MW and Apache, who induced removal by alleging violations of federal law in their complaint. Pet. App. 21-22.[2]

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[1] Petitioners try to manufacture a circuit conflict by implying that the court in *Morgan Guar. Trust* v. *Republic of Palau*, 971 F.2d 917 (2d Cir. 1992), found a non-removing defendant liable for removal costs under § 1447(c). Pet. 10. In fact, the *Morgan* case involved an award of fees against a *removing* defendant. The decision in no way supports such an award against a defendant that was not even a party at the time of the removal.

Petitioners also contend that the Fifth Circuit (presumably by distinguishing between removing and non-removing defendants) "rejected the 'joint and several' nature of the § 1447(c) award." Pet. 9. But, of course, a ruling that certain defendants *are not liable* implies nothing about how liability would be shared among parties that *were* liable.

[2] It should be added that the landowners' desire to penalize

(continued...)

Indeed, if any fee-shifting between the landowners and Apache and MW were appropriate here, then surely it would be the *landowners* who should pay *Apache and MW*'s costs and expenses. Nothing in the language of the statute limits liability thereunder to defendants. If a non-removing defendant may be subject to an award of costs under § 1447(c), then there is no reason why such an award should not be equally available against a plaintiff. And the landowners bear far more responsibility for the removal in this case than do Apache and MW.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1997

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[2] (...continued)
Apache and MW for their supposed *inaction* long after removal is quite inconsistent with their argument that the Fifth Circuit should not have considered their own post-removal conduct in denying the § 1447(c) award. Pet. 9.

Supreme Court, U.S.
FILED
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No. 97-423

In The

Supreme Court of the United States

October Term, 1996

W.H. AVITTS, *et al.*,

Petitioners,

vs.

AMOCO PRODUCTION CO., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT AMOCO PRODUCTION CO.

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21PP

RULE 29.6 STATEMENT

The parent company of Amoco Production Co. is Amoco Company. The nonwholly owned subsidiaries of Amoco Production Co. are as follows:

Energia Del Sur S.A.
East Texas Salt Water Disposal Co.
Gravcap, Inc.
Heat Transfer Research, Incorporated
Sultran Ltd.

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Sup. Ct. R. 10	1

Respondent Amoco Production Company ("Amoco") requests that the Court deny the petition for writ of certiorari seeking review of an opinion of the Fifth Circuit Court of Appeals. The Fifth Circuit's opinion is reported at 111 F.3d 30. For the convenience of the Court, all cites to the opinion will be to the opinion attached as Appendix C to the petition.

STATEMENT OF JURISDICTION

This Court should not exercise jurisdiction over this case pursuant to 28 U.S.C. § 1254 or Sup. Ct. R. 10. The Fifth Circuit's decision reversing the district court's 28 U.S.C. § 1447(c) award of $641,509.46 in attorney fees, expenses and costs (the "largest" section 1447(c) "award in history"), does not conflict with any decision of this Court or another court of appeals, nor does it depart from established and accepted jurisprudence or address an issue of federal law that requires guidance from this Court. Consequently, there is no reason for this Court to review the Fifth Circuit's decision.

STATEMENT OF THE CASE

Amoco respectfully opposes the petition for a writ of certiorari. The petition assails the Fifth Circuit's opinion for holdings never in fact made. For example, contrary to the first "question presented" in the petition, the Fifth Circuit never held that "filing a motion to remand is a mandatory, threshold pre-requisite before one may be entitled to a 28 U.S.C. § 1447(c) award for erroneous removal." (Petition at i). Petitioners reference 111 F.3d at 33-4 as the location of this purported holding. The Fifth Circuit's opinion ends on page 33 of 111 F.3d.

Equally egregious, the petitioners' statement of the case omits numerous facts pertinent to the case's history that were

presented to and considered by the Fifth Circuit, including the fact that the district court previously attempted to use a federal statute to award petitioners $644,141.99 as "attorneys fees."[1] After this award was reversed on appeal, the district court used 28 U.S.C. § 1447(c) to require payment of essentially the same amount to petitioners. These facts, as well as other facts which were presented to the Fifth Circuit but which are not set forth in the petition, are essential for this Court to fairly decide whether the Fifth Circuit's opinion is deserving of review. To enable the Court to make an informed decision, Amoco now provides the Court with those essential facts.

Petitioners originally filed separate suits in Texas state district court against Amoco seeking money damages for alleged injuries to their property. 1-15 Supp. R.[2] In each case, petitioners asserted that "[i]t is expected that the evidence will reflect that the damages caused by the Defendant are in violation of not only State, but also Federal law." 1-15 Supp R.; 1 R. 6. Amoco removed each of the cases on federal question grounds. *Id.* In the notices of removal, Amoco noted that although petitioners alleged that Amoco violated "Federal laws" in conducting Amoco's oil and gas operations, petitioners did not specify "*which* Federal laws." 1 R. 9; 1-15 Supp. R. (Emphasis in original). At the time of removal, Amoco filed a motion for more definite statement in which it sought clarification of petitioners' federal claims. 1 R. 23. After consolidating the separately filed suits, the district court "summarily denied" Amoco's motion and

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1. *Avitts v. Amoco Prod. Co.*, 840 F. Supp. 1116 (S.D. Tex. 1994), *vacated*, 53 F.3d 690 (5th Cir. 1995).

2. Record references will generally be given by volume followed by page number. "Supp. R." refers to the fifteen separate volumes containing the original petitions, notices of removal and motions for more definite statements. Exhibits are separately contained in unnumbered but labelled redwelds.

recommended that Amoco submit written discovery on the issue. 2 R. 206; 9 R. 2647. Complying with the district court's recommendation, Amoco served petitioners with written discovery which included the following question:

> Please identify, specifically and in detail, each and every statute on which you rely in this lawsuit.

9 R. 2620. Petitioners answered by specifying four federal statutes. 9 R. 2620.

After removal, petitioners amended their pleadings on several occasions; in their third amended complaint, petitioners added Apache Corporation ("Apache") and MW Petroleum Corporation ("MW") as defendants and dropped references to federal law. However, petitioners asserted federal jurisdiction in each of their amended complaints. App. at 16.

In a pretrial order, Amoco questioned the district court's jurisdiction. 8 R. 2131. Petitioners responded that the district court had federal question jurisdiction pursuant to 28 U.S.C. § 1331. 8 R. 2031. To resolve this issue, the magistrate directed Amoco to file a motion to dismiss, which Amoco did. 7 R. 1749-1736. Petitioners opposed the motion to dismiss. 7 R. 1764-1750. The district court denied the motion to dismiss, which it treated as a motion to remand, characterizing it as a "meritless challenge," and the trial proceeded as scheduled. 7 R. 1793-1791; 8 R. 2037.

In the midst of trial, before allowing Amoco to present any evidence, the district court halted the proceeding and, on its own motion, issued a mandatory injunction requiring Amoco, Apache and MW to conduct an additional environmental study of the property in issue. 8 R. 2050-2041. The district court also

awarded petitioners $644,141.99 in interim attorney fees and expenses, basing the award on the federal Oil Pollution Act of 1990, 33 U.S.C. § 2701-2761 (1988 and Supp. II) ("OPA"). *Avitts v. Amoco Prod. Co.*, 840 F. Supp. at 1127.[3]

Amoco's appeals from the interim fee award and injunction were consolidated by the Fifth Circuit. *Avitts v. Amoco Prod. Co.*, 53 F.3d 690, 692 (5th Cir. 1995). A few days before argument, the Fifth Circuit, not petitioners, raised the issue of subject matter jurisdiction. Following oral argument, the Fifth Circuit held that "[t]he district court lacked subject matter jurisdiction over this action and was therefore without authority to enter its orders." *Id.* at 694. The Fifth Circuit vacated the district court's interim fee order and injunction with instructions to remand the case to the state court. *Id.*; 9 R. 2509-2493. Each party was ordered to "bear its own costs." 9 R. 2509.

After the case was remanded to the district court, petitioners filed a Motion for Just Costs And Actual Expenses, Including Attorney's Fees Pursuant to 28 U.S.C. § 1447(c), seeking all attorney fees and expenses incurred by petitioners from the beginning of the lawsuit. 9 R. 2481-2338. Amoco opposed the motion. 9 R. 2650-2510. By order entered June 29, 1995, the district court granted petitioners' motion and awarded petitioners $641,509.46 in costs and attorney fees. 9 R. 2654-2651. The district court sought to justify this award by stating that "a reading of the plain language of the Original Complaint clearly shows that each and every one of Plaintiff's counts were stated in terms of state common law claims." *Id.* (This statement cannot be reconciled either with the district court's decision the previous

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3. The court appointed independent expert later concluded that there were "no currently known environmental problems" in the subject oil field that are the result of oil and gas operations and that "Amoco is believed to have operated the [field] in a prudent manner using operating practices that meet industry and regulatory standards." 9 R. 220.

year to predicate an interim award of attorney's fees on a federal statute — the OPA — or its previous characterization of Amoco's motion to dismiss as a "meritless challenge.") The district court assessed the section 1447(c) award against Apache and MW as well as Amoco, even though neither Apache nor MW had removed the case, and were not parties when the case was removed. 9 R. 2654.

Amoco appealed the section 1447(c) award as did Apache and MW. The Fifth Circuit, after hearing oral argument, held that the district court abused its discretion in awarding petitioners fees and costs under section 1447(c). App. at 22.

CORRECTION OF MISSTATEMENTS IN THE PETITION

The petition contains several misstatements that are material to this Court's determination of whether this case is worthy of review.

The Fifth Circuit ***never*** held that filing a motion to remand is a mandatory, threshold prerequisite to recovery of a section 1447(c) award. (Petition at i, 4, 8, 12). The Fifth Circuit held instead as follows:

> Given the active role appellees [petitioners] took in persuading the district court to retain jurisdiction of the case, fees are not appropriate. Appellees alleged violations of both state and federal law in their original state court complaint; did not move to remand; alleged that the district court had federal question jurisdiction in each amended complaint; opposed the defendants' motion to dismiss for lack of jurisdiction, and

> persuaded the court it had jurisdiction to hear the case.

App. at 21-22.

Similarly, the Fifth Circuit ***never*** held that in all cases, a section 1447(c) award is limited to costs, fees and expenses directly incurred in challenging removal. (Petition at i). Instead, the Fifth Circuit's interpretation of section 1447(c) is shown by the following passage:

> We interpret this language [section 1447(c)'s] "incurred as a result of removal" to limit the litigation expenses that may be awarded under this section to fees and costs incurred in federal court that would not have been incurred had the case remained in state court. . . . We conclude therefore that a party's costs of opposing removal, seeking remand, and other expenses incurred because of the improper removal may be awarded. By contrast, ordinary litigation expenses that would have been incurred had the action remained in state court are not recoverable because such expenses are not incurred "as a result of removal."

App. at 19.

In addition, the Fifth Circuit in *Avitts I* (the consolidated appeal from the interim fee award made under OPA and mandatory injunction) did not instruct petitioners to seek an award of costs, fees and expenses under section 1447(c). (Petition at 3). The Fifth Circuit's last sentence in *Avitts I* is as follows:

> The orders of the district court are vacated, and this matter is remanded to the district court with instructions to remand this action to the state court from which it was removed in accordance with 28 U.S.C. § 1447(c).

App. at 9.

In fact, the Fifth Circuit denied the motion for bill of costs filed by petitioners following the Fifth Circuit's determination that the district court lacked jurisdiction to enter the fee award and injunction.

REASONS FOR DENYING THE PETITION

When the Fifth Circuit's actual holdings are examined in the context of a complete and accurate history of this case the unworthiness of this case for review by writ of certiorari is readily apparent.

I.

PETITIONERS' CONFLICT CLAIMS ARE UNTENABLE.

Petitioners assert that *Avitts III* [4] is in "grave conflict" with section 1447(c) and with opinions from this Court, the Second, Third and Sixth Circuits and a Wisconsin District Court. (Petition at 8-9, 11-12). This assertion cannot withstand scrutiny.

Petitioners first argue that the Fifth Circuit held that a plaintiff must file a motion to remand as a prerequisite to a

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4. *Avitts II* is the district court's order awarding the petitioners section 1447(c) fees, costs and expenses. (Petition at 1).

section 1447(c) award and that this holding conflicts with the wording of section 1447(c) and *Morgan Guaranty Trust Co. v. Republic of Palau*, 971 F.2d 917 (2d Cir. 1992). (Petition at 8). Because the Fifth Circuit never held that a remand motion is a prerequisite to a section 1447(c) award, the Court need not linger long over this argument. Indeed, the Fifth Circuit merely noted petitioners' failure to file a motion to remand as one of *several* factors militating against a section 1447(c) award. App. at 21-22.

Petitioners then argue that the Fifth Circuit's decision conflicts with *Morgan*, 971 F.2d at 920 and *Mints v. Educational Testing Service*, 99 F.3d 1253, 1258 (3d Cir. 1996) because the Fifth Circuit held that a section 1447(c) award is limited to those fees and costs that would not have been incurred had the case remained in state court. In making this argument, petitioners suggest that the *Morgan* and *Mints* courts allowed the plaintiffs' section 1447(c) awards to include recovery of expenses that would have been incurred in state court had there not been a removal. This suggestion is incorrect.

Morgan involved highly "unusual circumstances" in which the defendant removed the case to federal court on the ground that it was a "foreign state" and successfully defeated a motion to remand. *Morgan*, 911 F.2d at 918. Several years later, after a bench trial on the merits, the district court entered judgment against the defendant in the amount of approximately $46 million, and on appeal, in response to questions posed by the appellate court during oral argument, the defendant reversed its position and asserted that there was no federal jurisdiction because it was not a foreign state. *Id.* at 919. The appellate court directed supplemental briefing on the jurisdictional issue and eventually decided that the case should be remanded to state court because of a lack of federal court jurisdiction. *Id.* at 919-20.

Under these "unusual circumstances," the district court awarded costs and attorney fees in the amount of $136,000 and the appellate court affirmed this award. *Id.* at 925. However, contrary to petitioners' implication, the district court limited the award to fees "relating to the foreign state and jurisdictional issues addressed in the supplemental briefings on appeal," expenses that would not have been incurred had the case remained in state court. *Id.* at 920. There simply is no conflict between *Morgan* and the Fifth Circuit's opinion in this case.[5]

Petitioners next argue that there is a conflict between the Fifth Circuit's decision and *Mints v. Educational Testing Service* because, according to petitioners, *Mints* held that a district court may award section 1447(c) fees and costs unrelated to removal and remand. (Petition at 8-9). First, even if *Mints* had held that costs unrelated to remand and removal are recoverable, such holding would not be in conflict with the decision in this case. The Fifth Circuit did not hold that costs and fees unrelated to removal could never be recovered; it only held that costs and fees that would have been incurred in state court should not be recoverable. App. at 19-20. The Fifth Circuit's holding is supported both by the statute and sound reasoning. Whether petitioners prosecuted their claims in state or federal court they would have incurred expert costs, court reporter fees and discovery expenses. To allow petitioners to recover those fees and expenses under section 1447(c) would turn the statute into a fee shifting device. It would effectively eliminate the phrase

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5. Petitioners attempt to support their argument with a partial quote from the *Morgan* dissent that omits crucial language and is taken out of context. (Petition at 8). When the full statement is read in its proper context it is clear that the dissenting judge was concerned with the size of the award. One can only imagine how he would react to the award made by the district court in this case, which petitioners concede is the "largest section" 1447(c) award "in history" and is almost four times the amount of the award in *Morgan*.

"incurred as a result of removal" from section 1447(c). Until the district court entered its award in this case, no court had so interpreted this statute.

Second, *Mints* did not hold that costs unrelated to removal and remand are recoverable. The threshold issue addressed in *Mints*, and the issue which predominates the Third Circuit's opinion, is whether the district court retained jurisdiction to consider a motion for section 1447(c) fees and costs filed after the remand order was signed and the clerk of the court mailed a copy of the remand order to the state court divesting the federal court of jurisdiction. *Mints*, 99 F.3d at 1257-1260. The Third Circuit held that the motion was timely. *Id.* at 1258-1259. In reaching that decision, the Third Circuit noted that a district court may remand a case on its own motion, without notice to the parties. In such a situation, neither presented by *Mints* or the present appeal, the Third Circuit observed that a plaintiff would be deprived of any opportunity to seek appropriate fees and costs if the section 1447(c) award were required to be included in the order for remand. *Id.* It is in that context that the Third Circuit commented almost parenthetically, and certainly in *dicta*, that costs and fees recoverable under section 1447(c) "could include ***items*** distinct from those incurred on a motion to remand." *Id.* at 1259 (emphasis added). In short, there is no conflict between *Avitts III* and *Mints v. Educational Testing Service*.

Also without merit is petitioners' argument that the Fifth Circuit's focus on the non-removing party's conduct in determining the propriety of section 1447(c) award conflicts with *Ahearn v. Charter Township*, 100 F.3d 451, 453 (6th Cir. 1996) and other cases which have held that a removing defendant bears the burden of establishing federal jurisdiction. (Petition at 9). Once again, the alleged conflict is nonexistent. *Ahearn*, which is not a section 1447(c) case, stands for the unremarkable

proposition that a removing defendant bears the burden of establishing federal subject-matter jurisdiction. *Ahearn*, 100 F.3d at 453-454. Amoco has no quarrel with that precept. Although the removing party must establish the propriety of federal jurisdiction, its failure to satisfy that burden when tested by a motion to remand, as occurred in *Ahearn*, does not automatically require the district court to make a section 1447(c) award. App. at 19.

Instead, in deciding whether a section 1447(c) award is appropriate, the courts have consistently considered whether the defendant's removal was reasonable in light of the circumstances. *See Miranti v. Lee*, 3 F.3d 925, 928 (5th Cir. 1993); *Howard Griggs Trucking, Inc. v. American Cent. Ins. Co.*, 894 F. Supp. 1503, 1510 (M.D. Ala. 1995) ("[T]he court declines to award costs and attorney fees when from aught that appears, the defendants in this action acted reasonably on the basis of the information available at the time of removal"); *Kluksdahl v. Muro Pharm., Inc.*, 886 F. Supp. 535, 540 (E.D. Va. 1995) (denying request for section 1447(c) fees and costs because notwithstanding that motion to remand was granted, defendant's "attempt to remove certainly was a legitimate one grounded in respectable legal authority"); *Rivers v. International Matex Tank Terminal*, 864 F. Supp. 556, 561 (E.D. La. 1994). Petitioners claim that the "trend among the circuits" is to make an award under section 1447(c) without reference to a defendant's particular state of mind (Petition at 6-7), but such claim is refuted by their own authorities. *See, e.g., Morris v. Bridgestone Firestone, Inc.*, 985 F.2d 238, 240 (6th Cir. 1993) (an award of fees and costs under section 1447(c) "should be affirmed if 'fair and equitable under all the circumstances' "); *Moore v. Permanente Med. Group, Inc.*, 981 F.2d 443, 448 (9th Cir. 1992) (defendant's intent was considered in deciding whether district court abused its discretion in awarding fees and costs under section 1447(c)).

Plainly put, the requirement that a removing defendant bear the burden of proving federal jurisdiction does not preclude a court from considering the reasonableness of the defendant's belief that federal jurisdiction existed in determining whether to award section 1447(c) fees, costs and expenses. The two concepts peacefully co-exist.

With respect to petitioners' argument that the supposed "conflict" in the circuit courts' opinions have created confusion about the reach of section 1447(c), the only parties that are confused about the reach of section 1447(c) appear to be petitioners. As demonstrated above, the circuit courts have had no difficulty in deciding the appropriateness of section 1447(c) awards. Guidance by this Court is thus unnecessary.

Equally untenable is petitioners' claim that the Fifth Circuit's decision is in conflict with this Court's statutory construction opinions. (Petition at 11-12). Petitioners selectively quote from *Demarest v. Manspeaker*, 498 U.S. 184 (1991), which addressed whether 28 U.S.C. § 1821 required payment of witness fees to a convicted state prisoner who testified at a federal trial pursuant to a writ of habeas corpus. Unlike section 1447(c), section 1821 does not confer any discretion on the district court, but provides that a witness in attendance at any court of the United States "shall" be paid fees. Given this fundamental difference between sections 1821 and 1447(c), it is peculiar that petitioners rely on it as a basis for a conflict.

Petitioners lastly argue that the Fifth Circuit's holding is in conflict with the "plain" wording of section 1447(c) because Congress did not require courts to consider a "plaintiff's post-removal conduct in deciding whether to award fees." (Petition at 11-12).[6] The flaw in this argument is that although section

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6. The Fifth Circuit's holding that petitioners are estopped to recover under section 1447(c) is an independent basis for its decision.

1447(c) may not require a court to consider a "plaintiff's post-removal conduct in deciding whether to award fees," it certainly does not prohibit a court from considering such conduct. The facts in this case (facts that were not disputed by petitioners), demonstrate that the petitioners bear a substantial share of the responsibility for this case remaining in federal court. There is nothing in section 1447(c) that prohibits the courts from taking these facts into consideration in determining whether an award of fees and costs is appropriate.

II.

THE FIFTH CIRCUIT DID NOT SUBSTITUTE ITS DISCRETION.

The issue before the Fifth Circuit was whether the district court abused its discretion in awarding petitioners $641,509.46 pursuant to section 1447(c). App. at 18, 19, 22; *see also Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 372 n.14 (5th Cir. 1995) (trial court's decision to award section 1447(c) fees and costs is reviewed for an abuse of discretion); *Moore v. Permanente Med. Group, Inc.*, 981 F.2d at 445 (same).

Petitioners' argument that the Fifth Circuit substituted its discretion for that of the district court is flatly refuted by the Fifth Circuit's opinion. The Fifth Circuit did precisely what it has jurisdiction to do: it decided, based on the record submitted to it, that the district court abused its discretion in awarding petitioners $641,509.46 under section 1447(c). App. at 22.

III.

THE FIFTH CIRCUIT DID NOT VIOLATE THE LAW OF THE CASE DOCTRINE.

Juxtaposing snippets of sentences from the Fifth Circuit's decision in *Avitts I* and *Avitts III*, and confusing two distinct

legal inquiries, petitioners argue that the Fifth Circuit violated the law of the case doctrine. (Petition at 14-15). Petitioners' argument is insupportable.

First, law of the case only applies to legal holdings. The case relied upon by petitioners so holds. *Anderegg v. High Standard, Inc.*, 825 F.2d 77, 80 (5th Cir. 1987). The phrases and passages petitioners have excerpted from *Avitts I* are not legal holdings and therefore do not implicate the law of the case doctrine. *Anderegg*, 825 F.2d at 80. Also, the legal concepts at issue in *Avitts III* differed from those at issue in *Avitts I*. App. at 19 ("The determination of whether Amoco's removal of this case was legally improper was decided in the earlier appeal and is not before us. . . . We still must determine whether under the circumstances of this case the district court abused its discretion by ordering Amoco to pay $641,509.46 in costs and fees.").

Second, petitioners misquote the Fifth Circuit. In *Avitts III*, Amoco asked the Fifth Circuit to review whether the district court abused its discretion in awarding section 1447(c) fees and costs. In recounting the case's procedural history, the Fifth Circuit stated as follows:

> In their state court complaints, appellees alleged that their damages caused by Amoco were in violation of "not only State law but also Federal Law." Based on federal question jurisdiction, Amoco removed the case to federal court in October 1990. The district court then consolidated appellees' suits.

App. at 15-16. The Fifth Circuit did not, as petitioners' clever editing of the Fifth Circuit's opinion erroneously suggests, change its view of the well-pleaded complaint rule.

IV.

THE FIFTH CIRCUIT DID NOT FIND FACTS.

The Fifth Circuit did not improperly resolve disputed facts. In holding that the district court abused its discretion in awarding petitioners $641,509 in fees, costs and expenses, the Fifth Circuit cited the following considerations: petitioners alleged a violation of federal law in their original state court complaints; petitioners did not move to remand; petitioners alleged that the district court had federal question jurisdiction in each amended complaint; petitioners opposed the defendants' motion to dismiss; and petitioners persuaded the district court it had jurisdiction to hear the case. *Id.* Petitioners have never disputed any of these facts.

V.

THE FIFTH CIRCUIT BASED ITS HOLDING ON ARGUMENTS PRESENTED BY THE LITIGANTS.

Amoco's appellant's brief identified the issue before the court as follows:

Did the district court abuse its discretion in awarding plaintiffs **$641,509.46** in attorney fees and costs pursuant to 28 U.S.C. § 1447(c) when:

1. Plaintiffs never requested that the case be remanded;

2. Plaintiffs vigorously *opposed* Amoco's pretrial efforts to return the case to state court;

3. The district court denied Amoco's pretrial motion to dismiss which raised the issue of the district court's lack of subject matter jurisdiction;

4. The district court awarded interim relief based on a federal statute (which relief was predicated on an erroneous application of the federal statute, as evidenced by this Court's subsequent determination that the district court lacked subject matter jurisdiction); and

5. More than 95% of the award represents fees and expenses *un*related to the removal or to the remand?

Nonetheless, petitioners claim that Amoco did not argue that petitioners were "estopped" to recover a section 1447(c) award. The above demonstrates that Amoco's argument was precisely that petitioners' own conduct and the rulings made by the district court made a section 1447(c) award unfair. Petitioners' argument that the Fifth Circuit's holding is premised on an argument not advanced by Amoco because Amoco did not use the word "estoppel" is beyond elevating form over substance; it is simply fanciful.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

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